



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 132 OF 2019**

**MARGARET MUKOMUGAA.....APPELLANT**

**-VERSUS-**

**SAMUEL KINGIRWA AMURU .....1<sup>ST</sup> RESPONDENT**

**CIABAIPWI AMURU.....2<sup>ND</sup> RESPONDENT**

**KABERIA AMURU.....3<sup>RD</sup> RESPONDENT**

**LAND ADJUDICATION OFFICER**

**TIGANIA DISTRICT.....4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal against the ruling and order of Hon G. Sogomo (PM) dated 20<sup>th</sup> December, 2018 in *Tigania PMCC No. 129 of 2013 - Margaret Mukomugaa v Samuel Kingirwa Amuru & 4 Others*. By the said ruling, the trial court upheld the Attorney General's preliminary objection to the effect that the Appellant's suit was time barred under the **Public Authorities Limitation Act (Cap. 39)**. The trial court further held that, in any event, it had no jurisdiction to entertain the suit on account of the limitations contained in **Section 26 (3) of the Land Consolidation Act (Cap. 283) and Section 29 of the Land Adjudication Act (Cap. 284)**. Consequently, the Appellant's suit was struck out with costs to the Respondents.

2. The material on record shows that by a plaint dated 28<sup>th</sup> March, 2013 the Appellant sought the following reliefs against the Respondents:

- a) *A declaration that Land parcel No. 380 Athinga/Athanja Adjudication section is the property of the Plaintiff.*
- b) *An order against the Defendants jointly and severally directing the 4<sup>th</sup> Respondent to amend its maps and place parcel No. 380 where the Plaintiff has settled.*
- c) *Costs and interest.*
- d) *Any better or further relief that the court may deem just to grant.*

3. The Appellant pleaded that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had colluded with the 4<sup>th</sup> Respondent to move the location of their land from a far away place called "Lailuba Grazing Area" to the location of the Appellant's land which was in a more fertile and more productive area and which she had already developed extensively.

4. The Appellant pleaded that the said action was undertaken fraudulently by all the Respondents and that as a result she was at risk of being rendered destitute as a result of wrongful deprivation of her property. The Appellant further pleaded that she had issued the relevant notice under the **Government Proceedings Act (Cap. 40)** and that she obtained the consent of the Land Adjudication Officer (**LAO**) to file suit.

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint statement of defence dated 3<sup>rd</sup> December, 2013 in which they denied the Appellant's claim in its entirety. They conceded that the Appellant was the owner of parcel 380 over which they had no interest but pleaded that it was the Appellant who was unjustifiably making a claim on their own parcel of land known as Parcel No. 4618 in the same Adjudication section. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, therefore, denied the fraud and particulars of fraud alleged against them and put the Appellant to strict proof thereof.

6. The record further shows that the Attorney General filed a defence dated 29<sup>th</sup> April, 2014 on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants in which the Appellant's claim was denied in its entirety. The Attorney General's defence was a general denial which generally transversed the Appellant's allegation without raising any positive defence.

7. It would appear that later on the Attorney General filed a notice of preliminary objection dated 22<sup>nd</sup> October, 2014 in which it was contended that the suit offended **Section 3 (1) of the Public Authorities Limitation Act (Cap. 39)** and that the suit was time barred. The said preliminary objection was canvassed through written submissions before the trial court.

8. Vide a ruling dated 20<sup>th</sup> December, 2018 the trial court upheld the Attorney General's preliminary objection to the effect that the Appellant's suit was time barred. The trial court of its own motion also found and held that it had no jurisdiction to entertain the suit since the Appellant had failed to follow and exhaust the dispute resolution mechanisms established under the **Land Consolidation Act** and the **Land Adjudication Act**. The court was of the opinion that it lacked jurisdiction under both **Section 26 of the Land Consolidation Act** and **Section 29 of the Land Adjudication Act** to entertain the suit.

## **B. THE GROUNDS OF APPEAL**

9. Being aggrieved by the said ruling, the Appellant filed a memorandum of appeal dated 18<sup>th</sup> November, 2019 raising the following grounds of appeal:

*(a) The learned trial Magistrate erred in law and fact in that he failed to understand and properly apply the Public Authorities Limitation Act to cases of fraud and to all the parties thereby coming to a wrong conclusion.*

*(b) The learned trial Magistrate failed to understand and properly apply the Land Consolidation Act and Land Adjudication Act and misled himself and came to a wrong conclusion.*

*(c) The learned trial Magistrate erred in law and fact in finding that he had no jurisdiction to hear and determine the matter and went ahead to determine to the issue of limitation which was a different issue before him.*

*(d) The ruling/decision of the trial Magistrate is bad in law and fact.*

10. Consequently, the Appellant prayed that the said ruling and order of the trial court be set aside so that the suit is reinstated for trial and disposal before the Magistrates' Court.

## **C. DIRECTIONS ON SUBMISSIONS**

11. When the appeal was listed for hearing on 2<sup>nd</sup> September 2020, it was directed that it shall be canvassed through written submissions. The parties were granted 21 days each to file and serve their respective submissions. The record shows that the Appellant's submissions were filed on 16<sup>th</sup> September 2020 whereas the 1<sup>st</sup> -3<sup>rd</sup> Respondents' submissions were filed on 6<sup>th</sup> October, 2020. However, there is no indication of the Attorney General having filed any submissions on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

## **D. THE ISSUES FOR DETERMINATION**

12. The court has considered the grounds set out in the memorandum of appeal and the material on record and is of the opinion that the following issues arise for determination in the appeal:

*(a) Whether the trial court erred in law in holding that the Appellant's suit was time barred.*

*(b) Whether the trial court erred in law by misapplying the provisions of the Land Consolidation Act and the Land Adjudication Act.*

*(c) Whether the trial court erred in law in determining the issue of jurisdiction suo motu.*

*(d) Who shall bear costs of the appeal.*

## **F. ANALYSIS AND DETERMINATION**

### **(a) Whether the trial court erred in law in holding that the Appellant's suit was time barred**

13. The court has considered the submissions and material on record on this issue. The Appellant contended that the trial court erred because **Section 3 (1) of the Public Authorities Limitation Act** applied only to tort or contract and not to fraud where it is pleaded in a pleading.

The Appellant submitted that fraud did not fall either within the realm of tort or contract and cited the case of **Kenya Railways Corporation & 2 Others v Mamusu Enterprises Ltd & 3 Others [2008] eKLR and Vitalis K. Kaitanny v Joseph Chepkwony & Another [2014] eKLR** in support of that submission.

14. On the other hand, the 1<sup>st</sup> – 3<sup>rd</sup> Respondents supported the findings of the trial court and submitted that fraud is a tort in the legal sense and they referred to **Black’s Law Dictionary (7<sup>th</sup> Edition)** which defines fraud as:

**“ A tort arising from a knowing misrepresentation, concealment of material facts, or reckless misrepresentation made to induce another to act to his or her detriment...”**

15. The 1<sup>st</sup> – 3<sup>rd</sup> Respondents further submitted that the Appellant had filed her suit more than 3 years after the determination of the objection she had lodged on the same issue before the LAO. It was, therefore, contended that the Appellant’s suit was time barred under **Section 3 (1) of the Public Authorities Limitation Act**. The Respondents further submitted that the cases of **Kenya Railways Corporation and 2 Others (supra) and Vitalis K. Kaitanny (supra)** were merely persuasive and not binding on the court.

16. The court has noted that in both authorities cited by the Appellant, the judges were not referred to the legal definition of fraud either in a law dictionary or decided cases. The court is satisfied on the basis of **Black’s Law Dictionary** that fraud is essentially a common law tort of deceit. The particulars of alleged fraud pleaded by the Appellant in her plaint consist of deceptive actions falling within with the realm of tort. It is, of course, possible for the tort of fraud to constitute a criminal offence when accompanied by the appropriate *mens rea*. So, fraud can constitute both a civil wrong and a criminal offence and the court is of the opinion that the civil aspect falls squarely within **Section 3 (1) of the Public Authorities Limitation Act** as a tort.

17. According to **Black’s Law Dictionary, (8<sup>th</sup> Edition)**, fraud is described as follows:

- 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is wilful) it may be a crime.**
- 2. A misrepresentation made recklessly without belief in its truth to induce another person to act.**
- 3. A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.**
- 4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties’ relative positions and resulting in an unconscionable bargain.**

18. The court is thus satisfied that though the trial court did not analyse the issue of limitation in detail the ultimate decision reached by the court was correct. The Appellant had pleaded in paragraph 7 of her plaint that the alleged scheme to deprive her of her land was executed on 8<sup>th</sup> October, 2010. The material on record shows that is the same date on which the Appellant’s objection No. 295 on Parcel No. 4618 was dismissed by the LAO (the 4<sup>th</sup> Respondent). The suit having been filed on 2<sup>nd</sup> October, 2013 it was definitely several months out of time. However, the court is of the opinion that the limitation would not apply to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants since the legislation applicable to them is the **Limitation of Actions Act (Cap. 22)**. A finding that the Appellant’s suit was time barred would, therefore, have resulted in the claim against the 4<sup>th</sup> and 5<sup>th</sup> Respondents being struck out leaving the suit against the 1<sup>st</sup> – 3<sup>rd</sup> Respondent’s intact. But whether or not the Appellant would have been able to prove the alleged fraud in the absence of the 4<sup>th</sup> and 5<sup>th</sup> Defendants is a different issue altogether which was not even canvassed before the trial court. Be that as it may, nothing much really turns on this issue since the Appellant’s suit was struck out also on account of want of jurisdiction.

**(b) Whether the trial court erred in law by misapplying the provisions of the Land Consolidation Act and the Land Adjudication Act**

19. The Appellant submitted that the trial court misapplied the law by holding that it had no jurisdiction to entertain the suit by virtue of **Section 26 (3) of the Land Control Act and Section 29 (1) of the Land Adjudication Act**. She submitted that her suit was not challenging the merits of the decision of the LAO in the objection proceedings and that her claim was simply based upon fraud. The Appellant relied upon the case of **Daniel Murungi Mwirabiu Anampiu v Jeremiah John Benard alias Jeremiah Guantai & Another (unreported)** for the proposition that where a dispute is not determined by a LAO during the adjudication process then the same can be determined by a court of law. However, the Appellant did not furnish the court with a copy of the said decision.

20. The Appellant further submitted that having obtained a letter of consent from the LAO to file suit, the trial court could not find that it had no jurisdiction to entertain the claim. The Appellant cited the Court of Appeal decision of **Stephen Kungutia & 2 Others v Severina Nchulubi Nyeri Civil Appeal No. 221 of 2010** in support of that submission. It was, therefore, contended that the trial court erred in law in declining jurisdiction in a matter where the consent of the LAO had been granted.

21. On the other hand, the 1<sup>st</sup> – 3<sup>rd</sup> Respondents supported the decision of the trial court on the issue of jurisdiction. It was submitted that the **Land Consolidation Act and the Land Adjudication Act** established elaborate and exhaustive dispute resolution mechanisms which the Appellant was supposed to observe strictly. It was submitted that the consent of the LAO could not confer jurisdiction on the trial court where none existed. It was further submitted that the Appellant was essentially challenging the merits of the decision of the LAO hence the consent could not serve any useful purpose.

22. The 1<sup>st</sup> – 3<sup>rd</sup> Respondents relied upon the same case of **Stephen Kungutia & 2 Others (supra)** cited by the Appellant and quoted the

following passage therefrom:-

**“In Julia Kaburia v Kabeera & 5 Others this could held:**

**“The Land Adjudication Act provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final...**

**In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication.”**

23. In the **Stephen Kungutia** case, however, the Court of Appeal found that the suit filed in the Magistrate’s Court was not seeking to challenge the decision of the LAO and that it was simply seeking to enforce a claim against the Appellants hence the consent was properly issued for that purpose. It was also found that neither the trial court nor the High Court had considered the merits of the decision of the LAO.

24. The court has fully considered the material on record on the genesis of the Appellant’s claim. The Appellant’s late husband and the late father of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents had fought over the suit property and parcel 4618 during the land adjudication process. The dispute culminated in the filing of objection No. 295 over parcel 4618 upon the death of the original claimant. Her claim during the objection proceedings was exactly the same case as pleaded in the plaint. It was alleged that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent’s late father had wrongfully moved the location of his land from a less productive area to the location where she had already settled and developed.

25. The material on record shows that the Appellant and the other concerned parties were fully heard before the LAO. Upon consideration of the evidence before him the LAO found that the parties before him had their respective portions of land which they had occupied and developed. Each family had developed its homestead on its own land hence the LAO ordered that the same status be maintained and he proceeded to dismiss the Appellant’s objection on 8<sup>th</sup> October, 2010

26. It is apparent from the material on record that the Appellant was dissatisfied with the said decision of the LAO in consequence whereof she filed the instant suit in 2013. The issues she has pleaded her in plaint are essentially the same issues which were canvassed before the LAO during the objection proceedings. It is also evident that if the Appellant’s objection had been allowed, she would not have filed suit seeking the prayers enumerated in paragraph 2 hereof.

27. It is thus clear that the Appellant having gone through the established dispute resolution mechanisms under the law and having lost, she would like to have a second bite at the cherry. By filing suit before the trial court, she was basically seeking to have the trial court undertake afresh the adjudication process which was undertaken by the various bodies and institutions set up under the land adjudication regime in the hope that she might ultimately get a favourable decision.

28. The net effect of the Appellant’s suit is that she wanted the trial court to usurp the powers of LAO in adjudicating and determining land rights in the concerned adjudication section. In her plaint, however, the Appellant avoided making reference to objection proceedings before the LAO and the adverse decision made thereon. In the case of **Tobias Achola Osindi & 13 Others v Cyprian Otieno Ogola & 6 Others [2013] eKLR**, the court considered the role of the court *vis-a-vis* the LAO in the adjudication process as follows:-

**“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...**

**The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under Section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act.”**

29. The court is thus of the opinion that under **Section 26 (3) of the Land Consolidation Act**, the decision of the LAO not being subject to appeal is final subject only to the supervisory jurisdiction of the superior courts to review the decision making process and legality as opposed to the merits of the various decisions which may have been taken in the course of adjudication. The law does not entitle the subordinate court to re-open and undertake a fresh adjudication and ascertainment of rights at the instance of the parties who may have lost through the laid down mechanisms. Accordingly, the court is of the opinion that regardless of whether it is the **Land Consolidation Act or the Land Adjudication Act** which applied to the land in dispute, the trial court had no jurisdiction to re-open the matter and grant the Appellant the prayers sought in her plaint even in light of the consent granted by the LAO. Accordingly, the court is of the opinion that the trial court was right in holding that it had no jurisdiction to entertain the suit.

**(c) Whether the trial court erred in law in raising and determining the issue of jurisdiction suo motu**

30. The court has considered the material on record on this issue. Even though the Attorney General’s notice of preliminary objection raised only the issue of limitation, the trial court after considering that issue went ahead to consider and determine the issue of jurisdiction. Although, the trial court was entitled to raise the issue of jurisdiction *suo motu*, the court is of the opinion that it ought to have accorded the parties an opportunity of being heard thereon before making its determination.

31. The material on record indicates that the parties were not given prior notice by the trial court that the issue of jurisdiction under the **Land Consolidation Act or the Land Adjudication Act** was up for decision as well. Consequently, all the concerned parties filed written submissions on the issue of limitation only. As a result, the trial court determined the issue of jurisdiction without the benefit of the parties’ arguments and submissions thereon.

32. In the case of **Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others**, it was held, *inter alia*, that:

**“ A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & Another v Musalia Mudavadi & 6 Others Ex parte Petronila Were [2014] eKLR. The learned judge drawing from the Court of Appeal precedent in Owners and Masters of the Motor Vessel “Joey” vs Owners and Masters of the Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:**

**“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The court on its own motion can take up the issue and make a determination thereof without the same being pleaded...”**

33. The rationale for allowing even a court of law to raise the issue of jurisdiction is obvious. As was held in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil ( Kenya) Ltd [1989] KLR 1**

**“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

34. The court is of the opinion that the Appellant’s contention that the trial court erred in determining the issue of limitation whereas it had no jurisdiction is neither here nor there. The bottomline is that the trial court found that it had no jurisdiction in the suit and consequently downed its tools. The order in which the determinations were made cannot possibly save the appeal. However, a perusal of the ruling dated 20<sup>th</sup> December, 2018 shows that the trial court first determined the issue of limitation before pronouncing itself on jurisdiction.

35. Although the court has found that the trial court erred in determining the issue of jurisdiction without the input of the parties, that failure did not occasion a miscarriage of justice. The parties have been accorded an opportunity to canvass the issue at length in the appeal and they have even cited authorities in support of their respective positions. The court has considered those submissions and authorities but still arrived at the same conclusion as the trial court did. Accordingly, the court finds no reason to interfere with the findings of the trial court on jurisdiction.

**(d) Who shall bear the costs of the appeal**

36. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the 1<sup>st</sup> – 3<sup>rd</sup> Respondents who participated in the appeal shall be awarded costs of the appeal.

**F. CONCLUSION AND DISPOSAL**

37. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant’s appeal is hereby dismissed with costs to the 1<sup>st</sup> – 3<sup>rd</sup> Respondents only.

It is so decided.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH DAY OF MAY, 2021.**

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**Y. M. ANGIMA**

**JUDGE**

**JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021.**

In the presence of:

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**L. N. MBUGUA**

**ELC JUDGE**